No. 4057

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

H. GOODFRIEND, JAMES D. AGNEW, SYLVESTER KINNEY, CARL H. SORENSON and EDWARD,

Plaintiffs in Error.

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

PETITION FOR REHEARING

Upon Writ of Error from the United States District Court for the District of Idaho, Southern Division

HAWLEY & HAWLEY,
J. R. SMEAD,
Attorneys for Plaintiff in Error.

CLAUDE W. GIBSON,
WILLIAM HEALY,
Of Counsel for Plaintiffs in Error.

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The plaintiffs in error above named now petition the above entitled court for a rehearing of the proceedings heretofore had upon writ of error from the trial court. Briefly stated, the grounds upon which such rehearing is sought are as follows:

I.

That the record shows that the validity of the search warrant for the Vernon Hotel and the claims

of illegality of the procedure had under such search warrant, were before this court in all the particulars covered by the brief of the plaintiffs in error. The petition originally before the trial court set out all claims of such invalidity and illegality. (Trans. pp. 28-36). That petition was heard on demurrer only. (Trans. p. 46.) The opinion of the trial court related to the demurrer only. (Trans. pp. 47-49.) When the matter was first opened up at the trial the objection was made with a reference to the petition and affidavits accompanying it, that the search was of a dwelling place and was an unlawful search and seizure. (Trans. p. 71.) When it was objected further that the matter had been closed and submitted to the court on that petition the court ruled otherwise, holding that the inquiry under that petition was not closed. (Trans. p. 74.) When the court excused the jury in order to hear further objections and arguments on the questions the whole matter was submitted to the court on the objections stated in the petition. (Trans. p. 75.) Eventually the objection to which the opinion of this court refers was merely added to the objections already made. (Trans. p. 78.) A little later (Trans. p. 81,) a further specific objection was made that the search warrant was illegal *as shown by the record* in this case, and further that a search was made thereunder of a private dwelling house without having any search warrant for such a place.

It must appear very clearly from the citations given, that all of the objections urged in our brief were before the trial court. If so, we respectfully submit that all of those made should be passed upon by this court. And we firmly believe that in so doing, this court will find it necessary to declare the search illegal and the admission of evidence so obtained erroneous, because of the insufficiency of the affidavit by which the warrant was procured, as well as because of the fact that premises were searched which were not contemplated either by the warrant or affidavit, to-wit, a private dwelling place.

And if these points be established we submit that the objection was good not only as to plaintiff in error Sorenson, but also as to all the defendants and the error entitled to all a reversal and a new trial. And the citations in the brief for the Government, claimed to show that only the defendant whose property was unlawfully seized may have the benefit of the objections made in this case, do not so hold.

Haywood et al vs. United States 268 Fed. 803 holds, not what the Government contends herein, but that the property in question was not the property of any defendant, but was the property of an association known as the I. W. W., which was not on trial and for whose acts the defendants were not charged, and that therefore the usual rule should apply that unless the defendant's property rights had been violated, they could not object nor would the court stop to

inquire how the government obtained the property of someone not on trial. This is a familiar rule but has no application to the instant case. It is unquestionable that the property seized belonged to a defendant. It is also beyond question that the ownership and possession of that property was in this case charged, not only against that defendant, but also against every other defendant in the case. The charge being conspiracy, all defendants, so to speak, stood in the shoes of the one whose property rights had been violated. It would indeed be a strange rule which holds one accountable for an act of ownership and possession of property, even to the extent of charging it against him as an overt act in the indictment, on the theory that he is responsible personally for that which was done or possessed by another defendant, but which rule would not allow him the benefit of the same objections open to the person on account of whose acts such other defendant was to be held personally responsible. Which is to say, that rights and liabilities should certainly be reciprocal If a defendant is to be placed in another man's shoes for one purpose, he should certainly be permitted to occupy those shoes for all purposes, including the related purpose of submitting objections to unlawful and unconstitutional procedure.

The case of *Lusco vs. United States, 287 Fed. 69*, did not involve any possible question which is before the court here. Lusco was tried on his own merits,

and had no possible right to object that the Government had seized some property belonging to another man who was not on trial. Any statement in that opinion based on any other theory is pure dictum. There is no authority to be cited from any source which contradicts the position which we have taken here.

II

We failed to make plain to the court our position concerning the necessity of an election by the prosecutor between the counts in the indictment depending on the National Prohibition Act for the criminality alleged, and other counts depending on the revenue laws. The Act of Congress, *42 Stat 222, 233*, supplementing the National Prohibition Law, states definitly that where the *same act* is a violation of the Internal Revenue Law and also of the National Prohibition Act, the defendant *can not be prosecuted under both.*

The joinder in one indictment does not remedy the matter, and precisely because of such joinder the prosecutor should be required to elect which set of counts he will stand on. Only by so doing can he avoid the double prosecution which the Act of Congress forbids in very plain language. These defendants were doubly prosecuted for a course of action alleged to violate both the National Prohibition Act and the Internal Revenue Laws. This was plainly contrary to both the letter and spirit of the Act of

Congress above referred to. As shown in our brief, election was asked both at the beginning of the trial and at its close. And we submit that it did not help the matter to frame one set of charges as conspiracy rather than direct charges of violating the National Prohibition Act. The only criminality in the conspiracy charges must have arisen from the terms of the National Prohibition Act. Except for it, the agreements charged in the conspiracy counts were perfectly lawful, and the principal overt acts charged were themselves violations of the National Prohibition Act, if true. And so these men were tried under a state of facts which was gauged and measured by the National Prohibition Act and the Internal Revenue Laws at one and the same time, and were convicted on both sets of charges. We submit that this was plainly erroneous.

CONCLUSION

In conclusion, we call the court's attention to its opinion wherein it holds as to the search warrant proceedings that the inquiry into such proceedings was *properly continued during the trial.* This being true, *the petition itself was before the court for that purpose* and it certainly presents all objections which are covered in our brief on file in this court. Therefore, those assignments of error should be passed on by this court.

And as to the misjoinder of the charges in the in-

dictment, this Court's opinion heretofore filed is based on the proposition that the different counts of the indictment all related to the same act. This is exactly our position at this time. Because of that fact the misjoinder was erroneous and the defendants were doubly convicted for the same act contrary to the provision of the statute herein referred to.

We submit that these matters are such as to justify a reconsideration of this matter, and a reversal of the judgment for the purpose of granting a new trial.

HAWLEY & HAWLEY,
J. R. SMEAD,
Attorneys for Plaintiffs in Error.

As one of the counsel for plaintiffs in error herein, I hereby certify that in my judgment the foregoing petition for a rehearing is well founded in the particulars set out and that it is not interposed for the purpose of delay.

J. R. Smead
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Counsel for Plaintiffs in Error.